

## **PUBLIC ARTWORK SERVICES AGREEMENT**

THIS AGREEMENT is entered into as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between the City of Boulder, a Colorado home-rule city (the “City”), and \_\_\_\_\_ (“the Artist”).

- A. The City of Boulder is undertaking a series of improvements to the \*\*. The City has decided to incorporate works of art into the \*\*; and
- B. Artist has submitted a proposal for the \*\* and the City has selected its proposal (the “Project”); and
- C. The parties wish to memorialize their understandings about the Project in a binding contract.

NOW THEREFORE, in consideration of the promises and obligations set forth below, the parties agree as follows:

### **1. Scope of the Work.**

Artist must furnish all of the materials and perform all of the work for the Project as shown on the drawings and described in the specifications attached as Exhibit A, and incorporated by reference into this Agreement. The Project consists in general terms of the design, and fabrication. The Artist’s work must be of high quality, in compliance with generally accepted standards of workmanship, and in conformity with this Agreement.

The City agrees to provide the items and/or services as shown on the attached Exhibit B, and incorporated by reference into this Agreement.

### **2. Protection, Prevention of Site Access and Risk.**

The Artist must keep competent supervisory personnel on the Project and provide efficient supervision, using Artist’s best skill and attention. The Artist must use reasonable efforts at all times to safely guard the Project, the City's property and adjacent property, including underground utilities, from damage, injury or loss in connection with the Project. Artist shall provide, erect, and maintain barricades, fences, lights, and other traffic control devices, and shall furnish such personnel (as the City may require) to warn the public and guard the site and shall take such other precautionary measures as are reasonably necessary to protect persons, property, and the work done under this Agreement.

During installation of the Project, Artist shall clean up the site at reasonable intervals and at other times when directed by the City. At all times while finish work is being accomplished, the site shall be kept clean, free of dust, construction debris and trash. Directly upon completion of the Project, Artist shall remove from the site all equipment and any waste materials not

previously disposed of, leaving the site thoroughly clean and ready for the City's final inspection.

The Artist must protect the Project and related materials from damage due to the nature of the work, the elements, carelessness of the Artist, or from any cause until the completion and acceptance of the Project by the City. The Artist assumes all risk of loss or damages under this agreement arising out of the nature of the work, the elements, carelessness of the Artist, or from any other causes which may be encountered in the performance of the work, until final acceptance of the Project by the City, except loss or damage proximately caused by the City, its employees, agents or other contractors.

**3. Time of Completion and Formal Acceptance.**

The Project shall be fully installed and completed by Artist by \_\_\_\_\_, unless delays are caused by the City, or by events beyond the control of both parties, at which time completion may be amended. Any extensions of time must be agreed to in writing by both parties.

The Artist must notify the City when the Project is fully installed and complete. No more than thirty (30) days after receiving such notice, the City will provide the Artist a written response, informing the Artist that either (i) the City agrees that the Project is fully installed and is complete consistent with the terms of this Agreement, and the City formally accepts the Project as completed ("Letter of Acceptance"); or (ii) the City does not consider the Project to be completed due to unresolved issues or defects that remain, and describing the outstanding issues or defects and the time frame in which the Artist must then cure before the City will issue a Letter of Acceptance.

The Project is not finally complete for purposes of this Agreement until the City has issued a Letter of Acceptance ("Final Acceptance."). Once the City has issued a Letter of Acceptance the City will be the sole owner of the Project.

**4. City Representative.**

The City will designate its project representative who will make all necessary and proper decisions with reference to the Project within the scope of his or her authority. The Artist must direct all requests for clarification or instruction to the City representative. The City has assigned \_\_\_\_\_ to serve as the City's representative to the Project.

**5. Design and Construction Fee.**

The total design and construction fee paid by the City to Artist under this Agreement will be \$\_\_\_\_\_. It is based on the specifications provided by Artist as shown on Exhibit A. The fee includes all design, materials, labor, delivery and installation of the Project.

**6. Payment Schedule and Terms.**

Payment shall occur as follows:

50% signing Agreement (\$ \_\_\_\_\_)  
25% Progress Payment at 50% fabrication completion  
15% Progress Payment at fabrication completion  
10% upon completion and acceptance by the City (\$ \_\_\_\_\_)

Invoices shall be submitted by Artist to the City for each payment and payment shall be made within 30 days of receipt. Artist shall pay all subcontractors promptly. Payment upon completion and acceptance shall not occur until a notice is advertised in accordance with Section 38-26-107, C.R.S.

The City will not make payment for completion and acceptance until it has accepted maintenance instructions for the Project.

## **7. Ownership and Rights Related to the Project.**

7.1. Ownership. Ownership of the Project shall pass to the City upon Final Acceptance. The Artist shall confirm in writing that ownership of the Work belongs to the City. Artist hereby irrevocably assigns, conveys and otherwise transfers to City and its respective successors and assigns title to the Project.

7.2. Reproduction. In view of the intention that the Project in its final dimensions shall be unique, Artist shall not make any additional exact duplicate reproduction of the final Project, nor shall Artist grant permission to others to do so except with the written permission of the City. Artist grants to the City and its assigns an irrevocable license to make two-dimensional reproductions of the Project for non-commercial purposes, including, but not limited to, reproductions used in advertising, brochures, media publicity, and catalogues or other similar publications, provided that these rights are exercised in a tasteful and professional manner and not to market goods or services. The Artist, however, may use photographic reproductions of the Project in its portfolio, in critical and scholarly writings, or for non-commercial purposes, including reproductions used in advertising brochures, media publicity, and catalogues or other similar publications

7.3. Credits. Any two-dimensional reproduction by the City shall contain a credit to Artist and display a copyright notice. Artist shall use its best efforts to give a credit reading substantially, "an original work owned and commissioned by the City of Boulder," in any public showing of the Project or reproductions thereof.

7.4. Copyright Notice. The Artist shall place a copyright notice on the Project that informs the public that a work is protected by copyright, identifies the copyright owner, and shows the year of first publication.

7.5. Registration. If the copyright is registered with the U.S. Copyright Office, the Artist shall provide the City with the Copy of the application for registration, the registration number, and the effective date of the registration.

7.6. Rights under the Visual Artists' Rights Act. To the extent the uses, modification, destruction or removal of the Project under this Agreement affect any rights Artist may have under the provisions of federal or state law, including the 1990 Visual Artists' Rights Act under 17 U.S.C. §106A(a) and §113, the Artist hereby knowingly waives any rights provided by those laws.

7.7. Right of First Refusal. Artist shall have the right of first refusal to any sale or donation of the Project during the ten years following submission of the Letter of Acceptance. Such right of first refusal shall be exercised by written notice to the City within thirty days of written notification by the City. If the Artist elects to exercise its right of first refusal it shall pay all costs associated with removal of the Project as set forth in section 8.2, below. If the City decides to donate or sell the Project, the donee or buyer of the Project (i) will assume all of the City's duties toward the Artist stated herein; (ii) will be obligated to defend and indemnify the City with respect to such duties; and (iii) will take the Project subject to all of the Artist's rights as stated herein. The donee or buyer shall be given a copy of this executed Agreement at the time of the donation or sale. The City will endeavor to notify the Artist of such donation and sale and of the identity of the donee or buyer. In the event the Artist does not exercise his/her right of first refusal, the City may proceed to sell or donate the Project.

## **8. Maintenance, Repairs and Restoration.**

8.1. Maintenance. The City recognizes that maintenance of the Project on a regular basis according to the maintenance instructions is essential to the integrity of the Project and that the City will be solely obliged to maintain the Project after Final Acceptance. The City shall nonetheless have the right to determine, in its sole discretion, when and if maintenance, repairs, and restorations to the Project will be made. To the extent practical and if the Artist has provided a current address pursuant to Section 13, during the ten years following submission of the Letter of Acceptance, the Artist shall be given the opportunity to consult on repairs or restorations in addition to those described in the maintenance instructions.

8.2. Removal, Relocation, or Destruction. Nothing in this Agreement shall preclude any right of the City in its sole discretion to (i) remove the Project from public display; (ii) move or relocate the Project to another location selected by the City for public display; or (iii) destroy the Project.

If the City shall at any time decide to destroy the Project, the City shall notify the Artist and offer the Artist a reasonable opportunity to recover the Project at no cost to the Artist, except for an obligation of the Artist to indemnify and reimburse the City for the difference between the City's cost to recover the Project and the City's cost to destroy the Project, as reasonably determined by the City. Without limiting the generality of this section, the Artist agrees that his rights in connection with the destruction of the Project are as described in this section; the Artist waives any greater or other rights which he might have in connection with the removal or destruction of the Project under 17 U.S.C. §106A(a) and §113.

## 9. Warranties.

9.1. Uniqueness. The Artist represents and warrants to the City that the Project is artistically unique, and agrees not to create or be involved in the creation of an identical artwork within 100 miles of Boulder, Colorado. Additionally, Artist represents and warrants that:

- A. The Project is solely the result of the artistic effort of the Artist;
- B. Except as otherwise disclosed in writing to the City prior to the time of execution hereof, the Project is unique and original and does not infringe upon any copyright and any other property or personal right;
- C. That neither the Project delivered hereunder, nor a duplicate thereof, has been accepted for sale elsewhere; and
- D. The Project is free and clear of any liens or claims or encumbrances from any source whatsoever.
- E. The Artist shall defend and indemnify the City if a third party asserts a copyright infringement or claim involving the Project.

9.2. Workmanship. Artist warrants to City that all work performed will be performed in a workmanlike manner.

9.3. Materials. The Project, as fabricated and executed, will use materials that are of good quality, fit for the selected purpose, within manufacturer tolerances and warranties, and free from all faults and defects not inherent in the quality required.

9.4. Defects & Deficiencies. Any work or material that is found to be defective or deficient, Artist will, without cost to City, correct it promptly after receipt of a written notice from the City, unless City has previously issued a Change Order accepting the defect or deficiency or City is the cause of the defect or deficiency, for example installation error.

For a period of two (2) years from the date of the City's Final Acceptance of the Project, the Artist agrees to replace or correct any material defects in the Project and that relate to a defect in the design, workmanship, or materials. The City shall give notice to Artist of any observed material defect. If Artist fails to cure any such material defects, or to make arrangements to do so within a reasonable time satisfactory to the City, the City has the right to arrange for such replacements or corrections, and Artist must reimburse the City for the costs of any such replacements or corrections. If the City asks Artist to repair damage caused to the Project not related to the design, workmanship, or materials, for example by vandalism, collision, extreme environmental conditions, or other unforeseeable causes, the City will reimburse Artist for reasonable material and labor costs for such repairs, except to the extent such damage is due to a defect in design, workmanship or materials used in Project.

This warranty and guarantee excludes any responsibility on the part of Artist to remedy any defect or deficiency caused by any abuse, misuse, or failure to properly maintain by City or others, and changes or modifications not performed by Artist.

In the event of any alteration or damage to the Project, whether intentional or accidental, the Artist shall have the right to disclaim authorship of the Project and upon written request of the Artist to the City shall remove the identification plaque at its own expense.

**10. Indemnification.**

The Artist shall defend, release, indemnify, and save and hold harmless the City from any and all claims, demands, suits, liabilities, actions, causes of action, or legal or equitable proceedings of any kind or nature, including worker's compensation claims of or by anyone whomsoever to the extent that such claims, losses, damages, or expenses are caused by the Artist's intentional or negligent acts, errors, or omissions, including acts or omissions of the Artist or her officers, employees, representatives, suppliers, invitees, licensees, sub-contractors, contractors, and agents. Provided, however, the Artist need not indemnify and save harmless the City, its officers, agents, and employees from damages proximately resulting from the negligence of the City's officers, agents, and employees. This indemnity clause shall also cover the City's reasonable defense costs in the event that the City, in its sole discretion, elects to provide its own defense. The insurance coverage specified herein constitutes the minimum requirements and said requirements shall in no way lessen or limit the liability of the Artist under the terms of the Agreement. The Artist shall procure and maintain at his own expense and cost any additional kinds and amounts of insurance that in his judgment may be necessary for his proper protection in the prosecution of the services hereunder. This indemnity clause shall survive termination of this Agreement.

**11. Insurance.** Artist agrees to procure and maintain in force during the terms of this Agreement, at its own cost, the following minimum coverages:

- A. Workers' Compensation and Employers' Liability
  - i. State of Colorado: Statutory
- B. Commercial General Liability
  - i. Bodily Injury & Property Damage General Aggregate Limit \$1,000,000
  - ii. Personal & Advertising Injury Limit \$1,000,000
  - iii. Each Occurrence Limit \$1,000,000

The policy shall be on an Occurrence Form and include the following coverages: Premises Operations; Personal and Advertising Injury; Medical Payments; Liability assumed under an Insured Contract; Independent Contractors; and Broad Form Property Damage. Coverage provided should be at least as broad as found in Insurance Services Office (ISO) form CG0001.

### C. Automobile Liability Limits

The Artist agrees to provide evidence that the Artist maintains in their vehicle proof of current liability insurance coverage in compliance with the State of Colorado Motor Vehicle Financial Responsibility Act. The City of Boulder shall be named as additional insured. The minimum amount of insurance required by the State is \$25,000 per person and \$50,000 per accident for bodily injury or death and \$15,000 for property damage. The Artist's car insurance is the sole coverage for any casualty or liability claims.

Prior to the execution of this Agreement by the City, the Artist shall forward Certificates of Insurance to Purchasing. The insurance required shall be procured and maintained in full force and effect for the duration of the Agreement. Certificate Holder shall be the City of Boulder at 1777 Broadway, P.O. Box 791, Boulder, CO 80306.

**All insurance policies** (except Workers Compensation) shall include City of Boulder and its elected officials and employees as additional insureds as their interests may appear. The additional insured endorsement should be at least as broad as ISO form CG2010 for General Liability coverage and similar forms for Commercial Auto Liability.

The City requires that all policies of insurance be written on a primary basis, non-contributory with any other insurance coverages and/or self-insurance carried by the City.

The City of Boulder reserves the right to reject any insurer it deems not financially acceptable by insurance industry standards. Property and Liability Insurance Companies shall be licenses to do business in Colorado and shall have an AM Best rating of not less than A- VI.

Artist, or Artist's insurance broker, shall notify the City of any cancellation or reduction in coverage or limits of any insurance within seven (7) days of receipt of insurer's notification to that effect. The Artist shall forthwith obtain and submit proof of substitute insurance in the event of expiration or cancellation of coverage.

#### **12. Termination/Default.**

A. Termination. The City may terminate this Agreement on no less than fourteen (14) days written notice to the Artist. In such event the City will compensate Artist for all services performed and materials provided or procured to the date Artist receives the notice of termination, together with reasonable expenses and prorated profit then due, unless the parties agree otherwise in writing.

B. Default. Each and every term and condition of this Agreement is deemed to be a material element of this Agreement. If either party fails or refuses to perform according to the terms of this Agreement; it may be declared in default thereof. A declaration of default by either party must be made in writing to the other party, describe how the allegedly defaulting party has failed to perform according to the terms of this Agreement, and provide an opportunity for consultation with the other party to review what steps may be necessary to cure the default.

C. Remedies Upon Default. If one party declares the other in default of this Agreement and performance is possible, the allegedly defaulting party will have a period of fourteen (14) days within which to cure the default. If the allegedly defaulting party fails to correct the default or timely performance is not possible, the party declaring default may elect to: (1) immediately terminate the Agreement; (2) treat the Agreement as continuing and require specific performance; and/or (3) avail itself of any other remedy at law or equity. If either party elects to terminate the agreement for default, termination will be effective upon the mailing, by the terminating party, of written notice of termination to the defaulting party and the City will compensate the Artist for all services performed and materials provided or procured in accordance with the terms of this Agreement up to the point of termination and the Artist will deliver or otherwise make available all design plans, sketches, fabrications, or other materials that the Artist may have created or purchased in performance of the Agreement up to the point of termination.

### **13. Miscellaneous Provisions.**

A. Assignment. Artist understands that the City enters into this Agreement based on the special abilities of Artist and that the City considers this Agreement to be an agreement for personal services. Accordingly, Artist must neither assign any responsibilities nor delegate any duties arising under this Agreement without the prior written consent of the City.

B. Independent Contractor. The relationship between the Artist and the City is that of an independent contractor. The Artist shall not be deemed to be, nor shall it represent itself as, an employee, partner, or joint venturer of the City. No employee or officer of the City shall supervise the Artist. The Artist is not entitled to worker's compensation benefits and is obligated to directly pay federal and state income tax on money earned under this Agreement.

C. License and Business. The Artist must hold, in the Artist's name, all necessary licenses and permits to perform the work. The Artist must have full authority to do business in the State of Colorado, and have a designated place of business for making and accepting communications with or from the City. The Artist must maintain a current address and telephone number with the City throughout the term of this Agreement.

D. Governing Law. This Agreement is governed by the laws of the State of Colorado. Any suit between the parties shall be brought only in the courts of the Twentieth Judicial District of the State of Colorado.

E. Notice. Any notice or other communication given by either party to the other related to this Agreement must be hand delivered; sent by a commercial carrier; or sent by mail, addressed to the party at its address as set forth below. The notice or other communication will be effective on the date it is delivered or on the third business day after being sent, whichever comes first.

If to the City:



If to the Artist:

The Artist shall notify the City of changes in his address. The failure to do so, if such failure prevents the City from locating the Artist, shall be deemed a waiver by the Artist of the rights granted to or retained by the Artist in this Agreement, the exercise of which requires response by the Artist. A mailing of notice by the City by certified mail with return receipt requested to the address of the Artist or of his attorney currently on file with the City at the time of such mailing shall be deemed to be an adequate notification effort by the City hereunder.

F. Entire Agreement. This document constitutes the entire agreement between the parties and supersedes all prior understandings and discussions. This Agreement may only be modified in writing by an amendment signed by both parties

G. Prohibition on Contracts for Services. The Artist certifies that the Artist shall comply with the provisions of Sections 8-17.5-101, *et seq.*, C.R.S. The Artist shall not knowingly employ or contract with an illegal alien to perform work under this Agreement enter into a contract with a subcontractor that fails to certify to the Artist that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement.

The Artist represents, warrants, and agrees (i) that it has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement through participation in either the E-Verify or the Department Program; (ii) that the Artist is prohibited from using either the E-Verify Program or the Department Program procedures to undertake pre-employment screening of job applicants while this Agreement for services is being performed; and (iii) if the Artist obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, the Artist shall be required to:

- (a) Notify the subcontractor and the City within three days that the Artist has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and
- (b) Terminate the subcontract with the subcontractor if within three days of receiving the notice required pursuant to 8-17.5-102(2)(b)(III)(A) the subcontractor does not stop employing or contracting with the illegal alien; except that the Artist shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

The Artist further agrees that it shall comply with all reasonable requests made in the course of an investigation under Section 8-17.5-102(5), C.R.S. by the Colorado Department of Labor and Employment. If the Artist fails to comply with any requirement of this provision or Sections 8-17.5-101, *et seq.*, C.R.S. the City may terminate this Agreement for breach and the Artist shall be liable for actual and consequential damages to the City.

H. No Multiple Fiscal Year Obligation. Nothing herein shall constitute a multiple fiscal year obligation pursuant to Colorado Constitution, Article X, Section 20. Notwithstanding any other provision of this Agreement, the City's obligations under this Agreement are subject to annual appropriation by the City Council of the City. Any failure of a City Council annually to appropriate adequate monies to finance the City's obligations under this Agreement shall act in effect to terminate this Agreement at such time as such then-existing appropriations are to be depleted. Notice shall be given as soon as reasonably possible to the Artist of any failure of a City Council to appropriate such adequate monies.

I. Authority. Artist warrants that the individual executing this Agreement is properly authorized to bind the Artist to this Agreement.

J. Headings. The captions and headings set forth herein are for convenience of reference only and shall not be construed as to define or limit the terms and provisions hereof.

K. Severability. If any part, term, or provision of this Agreement is held by the Courts to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall be unaffected, and the rights and obligations of the Parties shall be construed and enforced as if the Agreement did not contain the particular part, term, or provision held to be invalid.

L. Disputes. The parties agree to use the principles of collaboration and cooperation, to identify and engage in measures to prevent and resolve potential sources of conflict before they escalate into disputes, claims or legal actions. The Parties agree that any and all claims, controversies, breaches or disputes arising from or related to this Agreement, including those pertaining to the formation, construction, performance, applicability, interpretation, or enforceability of this Agreement is subject to a requirement to mediation in Colorado prior to filing any lawsuit.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

**CITY OF BOULDER**

BY: \_\_\_\_\_  
City Manager

ATTEST:  
  
\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:  
  
\_\_\_\_\_  
City Attorney

**ARTIST:**  
  
\_\_\_\_\_  
Name:

STATE OF COLORADO    )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

Acknowledged before me, a notary public, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_, by  
\_\_\_\_\_, as \_\_\_\_\_.

Witness my hand and official seal.

My commission expires:

\_\_\_\_\_  
Notary Public

(SEAL)

**EXHIBIT A  
PROJECT SPECIFICATIONS**

DRAFT

**EXHIBIT B**  
**MATERIALS AND/OR SERVICES PROVIDED BY CITY**

DRAFT

**EXHIBIT B  
CITY ITEMS**

DRAFT